

Memorandum of Points and Authorities

1 list of 758 items of identified personal property which were sold. Of these, the vast majority were
2 not owned by the estate as shown on Exhibit "1" to the Declaration of Brian Federico filed
3 herewith.

4 Movants contend the order is void *ab initio* because it was issued without the requisite due
5 process in the form of an adversary proceeding which is required in cases of disputed ownership.

6 **NOTICE TO THE TRUSTEE**

7 Importantly, the Trustee was advised regularly and consistently by Brian Federico and the
8 Debtor, Lawrence Paul Federico, that the vast majority of the items to be sold were not property of
9 the estate. This notice which was given as early as May 2007; well before the motion to approve
10 the sale of the personal property was filed in October 2007. B. Federico Declaration, p.2, 1.4-p.3,
11 1.10; P. Federico Declaration, p. 2, 1. 3-24. Although the official auctioneer's list consists of 758
12 items sold, there were literally thousands of personal property items disposed of at the auction
13 because some personal property was sold in bulk in the form of containers full of smaller goods.
14 Neither Brian Federico nor the Debtor were allowed access to the documents which they sought in
15 order to demonstrate their title. The containers which had the requested information were sold at
16 the auction thus limiting the Federicos' ability to prove to the Trustee that the items to be auctioned
17 included little estate property; however, they were able to unilaterally retrieve some items at and
18 after the auction which substantiate their ownership.

19 **PROPERTY SOLD OR ATTEMPTED TO BE SOLD**

20 A mere sampling of wrongfully appropriated personal property includes:

21 1. The 1975 Peterbilt concrete truck, license number 7707P. Mr. Brian Federico has at
22 all times asserted an exclusive ownership interest in this vehicle. He bought the vehicle at an
23 auction from the prior lienholder in August 2003.

24 Even the Trustee's copies of DMV printouts filed November 7, 2007 with the court prior to
25 the November 14, 2007 hearing on the Trustee's Motion to Approve the Sale shows title to this item
26 in D/L Concrete Pumping, Inc. an entity in which the debtor never had an interest. Anderson
27 Declaration, Exhibit 7, p. 45, 46, 47, 48. This item was included in the January 17, 2008 letter of
28 the undersigned counsel to Trustee's counsel which specifically requested that it not be sold.

Anderson Declaration, Exhibit 3, p. 8,9,10, and 17-23. This request was denied. See letter of M. Oleksa dated January 18, 2008. Anderson Declaration, Exhibit 4, p. 26.

2. 1983 International truck model 1740, VIN-3195. The Trustee's copies of DMV printouts filed November 7, 2007 with the court prior to the November 14, 2007 hearing on the Trustee's sale motion shows no interest of the estate in this item; rather, title shows "Speciality Equipment Service" (a service oriented company) which is an entity owned by William Federico and others not related to the debtor. Anderson Declaration, Exhibit 7, p. 70, 71, 72. The debtor at one time owned "Specialty Equipment Sales" (an equipment company) but had nothing to do with Specialty Equipment Service.

This item was included in the January 17, 2008 letter of the undersigned counsel to Trustee's counsel which specifically requested that it not be sold. Anderson Declaration, Exhibit 3, p.8, 9, 10. The request was denied. See letter of M. Oleksa dated January 18, 2008. Anderson Declaration, Exhibit 4, p. 26.

3. 1980 Chevy 60 Flatbed, VIN-0215.

The Trustee's copies of DMV printouts filed November 7, 2007 with the court prior to the November 14, 2007 hearing on the Trustee's sale motion shows no interest of the estate in the item, rather, title is shown in Brian Rhoades and/or Specialty Equipment Services. Anderson Declaration, Exhibit 7, p. 49, 50, 51, 52. This item was included in the January 17, 2008 letter of the undersigned counsel to Trustees counsel which specifically requested that it not be sold. Anderson Declaration, Exhibit 3, p. 8, 9, 10. This request was denied. See letter of M. Oleksa dated January 18, 2008. Anderson Declaration, Exhibit 4, p. 26.

4. 1995 Chevy Suburban 3500, VIN-5426. The Trustee's copies of DMV printouts filed November 7, 2007 with the court prior to the November 14,2007 hearing on the Trustee's sale motion shows no interest of the estate in this item. This vehicle was purchased in 2004 by Michelle Federico, wife of William Federico. There are only two names on the records submitted by the Trustee: Michelle Federico and Thomas Bros. Welding. Neither one is the debtor. Anderson Declaration, D. Anderson Declaration, Exhibit 7, p. 76, 77, 78, 79.

This item was included in the January 17, 2008 letter of the undersigned counsel to the

1 Trustee's counsel which specifically requested that it not be sold. This request was denied. See
2 letter of M. Oleksa dated January 18, 2008. Exhibit 4, p. 26.

3 The response of the Trustee on January 18, 2008, i.e., the day before the sale, was that the
4 Trustee had the right to sell the vehicle based on the Declaration of Larry Turner filed November 7,
5 2007 in which he disclaims any interest in the vehicle and says it belongs to the debtor. See letter of
6 M. Oleksa, supra. Notwithstanding the Trustee's asserted position, the vehicle was withdrawn from
7 the auction. William Federico continues to assert an exclusive ownership interest in the vehicle and
8 prior to the auction requested time to prove his ownership. This was rejected by the Trustee. B.
9 Federico Declaration, p.1, l.20-p.2, l. 3.

10 5. 1981 Ford pickup, VIN-8078. This vehicle was sold at auction although titled in the
11 name of Bill L. Morris, movant Brian Federico's father-in-law. Brian Federico Declaration, Exhibit
12 2. Obviously, this was not titled in the name of the debtor or any related entity. This is an example
13 of a vehicle whose ownership documentation was located inside one of the vehicles to be sold
14 which was only able to be accessed and retrieved during and after the auction itself without the
15 consent of the Trustee. B. Federico, p.1, l. 28- p.2, l. 3.

16 All the foregoing items, which are but a fraction of the hundreds of items auctioned, were
17 claimed by one or more of movants. More importantly, Paul Federico, the debtor, agreed and
18 clearly stated at all times that these items and the vast majority of items at 900 Welty Road did not
19 belong to the estate. The Trustee was so advised as early as May or June 2007 by the debtor and
20 September 2007 by Brian Federico and periodically thereafter by each of them. See Declarations of
21 Paul Federico and Brian Federico.

22 It may not be unusual for a third party to dispute an interest in an item in which the debtor
23 also claims an interest thus giving rise to a conflict. But in this case, the debtor repeatedly advised
24 the Trustee and his counsel that the estate had no interest in any of the items claimed by movants.
25 P. Federico Declaration, p. 2, l.3- p.4, l.12. No one but the Trustee maintained that the items in
26 question belonged to the estate.

27 The property to be sold included many vehicles and thousands of items contained in truck
28 trailers. The Trustee apparently decided early on that whatever was located at 900 Welty Road was

1 subject to auction as part of the estate. This is odd because the debtor has never had an interest in
2 900 Welty Road which is owned by Leo Arcos and was rented at that time to Pressure Concrete,
3 Inc. ("PCI") for whom the debtor worked as a salaried employee. See Declaration of Paul Federico.
4 The Trustee continued in this belief, despite the fact that the debtor advised him shortly after the
5 conclusion of the 341 Meeting on May 10, 2007 that most of the items at 900 Welty Road were not
6 property of the estate. Most belonged to one of the movants who had legal or equitable title in
7 various pieces of equipment on site.

8 Just prior to the auction, the objecting party and others removed certain items from the sale
9 over the objection of the Trustee. Fortunately, they were thus able to save some items from being
10 wrongfully sold.

11 The notices and requests made to the Trustee and/or auctioneer prior to the auction sale include:

12 1. The Opposition filed October 16, 2007 to the Trustee's motion to sell which included
13 the objection that the estate has no interest in the auction property, citing *Moldo vs. Clark* 266 BR
14 163(BAP 9th Cir. 2001) which prohibits sale of property pursuant to §363 without first determining
15 that it is in fact property of the bankruptcy estate. Anderson Declaration, Exhibit 1.

16 2. The Declaration of Brian Federico filed October 16, 2007 in support of his
17 Opposition in which he states that he is the owner of most of the items to be sold. Anderson
18 Declaration, Exhibit 2.

19 3. The letter dated January 17, 2008 from the undersigned counsel to the Trustee's
20 attorney Oleksa advising that most of the property is not that of the estate and that the Trustee
21 operates at his peril in proceeding with the auction. The letter included evidence of ownership of
22 certain items of Brian and/or William Federico. Anderson Declaration, Exhibit 3.

23 4. A second letter to the Trustee's attorney dated January 18, 2008. Anderson
24 Declaration, Exhibit 5.

25 5. Over three emails from Paul Federico, the debtor, to the Trustee and/or auctioneer
26 over the period of January 16, 17, and 18, 2008 advising that the sale should not proceed until
27 ownership has been addressed. P. Federico Declaration, Exhibit 1, 2, 3.

28 6. In addition to these written communications, various oral notices were given to the

1 Trustee and/or auctioneer prior to the auction and on the day of the auction itself by Brian and/or
2 Paul Federico. Declarations of Brian Federico and Paul Federico filed herewith.

3 As item No. 3 above, the undersigned counsel sent a letter dated January 17, 2008 to the
4 Trustee's attorney, Michelle G. Oleksa, stating in part as follows:

5 We demand that the sale be postponed to allow my clients to find supportive
6 documentation on certain items which he owns. There are also undocumented items
7 as to which he claims an ownership interest which would involve more elaborate
8 proof. Since he is in the construction business and has used much of the equipment
he has been forced to rent certain pieces of equipment. For this reason, he is not
interested in receiving the liquidation value of the items. Rather, he demands
retaining the ownership and use of the equipment itself.

9 Other items sold included toys and kids' sporting equipment including ten bicycles which
10 clearly would not be expected to be part of the bankruptcy estate of a single adult man with adult
11 children out of the area; especially, where the estate consists of a business liquidation. P. Federico
12 Declaration, p. 3, l. 5-11.

13 Photographs of two trailers and some bedding and other personal items owned by Brian
14 Federico at the auction including Brian Federico's son's 1997 karate trophy, are attached as Exhibit
15 4 to the Declaration of Brain Federico.

16 **HISTORY OF VEHICLES/EQUIPMENT/TOOLS**

17 Some of the vehicles, equipment, and tools at 900 Welty Road belonged at all pertinent
18 times to Brian Federico or William Federico. William Federico is a paraplegic living in Colorado.
19 Some of the memorabilia and personal items were also claimed by Doug and Terri Brown. Terri
20 Brown is the sister of Brian, William, and Paul Federico and is the representative of their mother's
21 estate. Of the vehicles at Welty Road of which Brian Federico claims ownership, many were still in
22 the name of the debtor or an affiliate of the debtor, e.g., Fargo Construction. These were sold to
23 Brian in 2001 as part of a vehicle/equipment/tool exchange in satisfaction of debts in the amount of
24 over \$250,000 extended to the debtor by him prior to that time. All this was explained to the
25 Trustee months before the motion to sell the property was filed. The debtor has not owned an
26 acting construction business since that time and thus had no need for the equipment. Movants,
27 needed access to the trailers and bins at 900 Welty Road in order to substantiate their claim to the
28 exchange of the personal property in 2001 and ownership to some of the items themselves. But

1 access was denied.

2 The registration of many of the registered vehicles was not changed from the name of the
3 debtor to Brian Federico after the sale to him because many of the vehicles were simply parked
4 and/or transported to a job site where they remained to be used as offroad vehicles. Under such
5 circumstances, they do not need to be registered and Brian Federico did not want to incur
6 registration fees since he did not need to do so. B. Federico Declaration, p. 4, l. 8-10.

7 Movants have sustained the loss of all personal property of theirs which was auctioned. This
8 constitutes the majority of the \$149,000 in auction proceeds generated. Brian Federico was forced
9 to buy back many of the items he or William Federico owned and, accordingly, purchased
10 approximately \$30,000 worth of vehicles, equipment, and tools at the auction. Brian Federico
11 Declaration, p. 4, l. 11-13.

12 **WHERE A THIRD PARTY CLAIMS EXCLUSIVE OWNERSHIP TO PROPERTY SUBJECT**
13 **TO SALE, AN ADVERSARY PROCEEDING IS REQUIRED TO DETERMINE OWNERSHIP**

14 The Trustee's Motion for Authority to Sell Personal Property Free and Clear of Tax Liens
15 was filed on October 1, 2007. The Motion was entitled a motion to sell free of tax liens and the
16 motion itself stated it was to authorize a sale free of tax liens. The attorney for Brian Federico at
17 that time was David Johnston who filed an opposition to the sale and submitted a Declaration of
18 Brian Federico in opposition to the proposed sale of the personal property. Copies of the
19 Opposition and the Declaration are referred to in the Declaration of David F. Anderson filed
20 herewith and are filed as Exhibits "1" and "2" to that Declaration. Both the Opposition and the
21 Declaration assert Mr. Federico's claim of ownership in the property being sold and oppose the sale
22 itself.

23 The court issued its order filed November 21, 2007 which states that the personal property
24 shall be sold "free and clear of the interest of Brian Federico, if any." p.2, l. 18-19. The tentative
25 ruling, but not the order, referred to §363(f)(4) as the basis for the court's ruling. As noted below,
26 the Trustee had no authority to sell property other than property of the estate except under certain
27 circumscribed situations, e.g., property of a cotenant under §363. When ownership to property is in
28 dispute, the Trustee must file an adversary proceeding to have the court determine proper title. The

Trustee is not free to dispose of, or otherwise exert control over, non-estate property. In *Moldo vs. Clark*, 266 BR 163, *supra*, the court held that § 363(f)(4) does not provide for a sale in which the underlying interest of the debtor's estate in the property to be sold is in dispute; rather, it is designed for disputes based on the assumption that the debtor has at least some interest in the property. As stated in *Moldo*:

The purpose of § 363(f)(4) is to permit property of the estate to be sold free and clear of interests that are disputed by the representative of the estate so that liquidation of the estate's assets need not be delayed while such disputes are being litigated. *See, generally*, 3 Lawrence P. King, *Collier on Bankruptcy* ¶ 363.06 (15th ed. rev.1998)

...

[T]he property that can be sold free and clear under section 363(f) is defined by subsection (b) and (c) of section 363 as "property of the estate" *Id.* Pursuant to section 541(a), "property of the estate" consists generally of all property in which the debtor had an interest on the date of bankruptcy,

...

The threshold question, is it still property of the estate, must first be decided.

266 BR at 171-172. (emphasis added)

See also *In re: Popp* 323 BR 260 (BAP 9th Cir. 2005) which cites *In re: Rodeo Canon Development Corporation* 362 Fed. 3rd 603 (9th Cir. 2004), withdrawn on other grounds by 126 Federal Appendix 353, 2005 WL 663421.

Here there had never been the threshold determination of whether the property to be sold was actually owned to any extent by the estate despite repeated objections over many months. Thus, there was an unconstitutional violation of due process in the disposition of this property as a matter of law.

An Adversary Proceeding Was Required

The Ninth Circuit has made it clear that when a Bankruptcy Rule 7001 category is at issue, an adversary proceeding is required as the defending party is entitled to the procedural due process protections provided by an adversary proceeding. *In re Lyons*, 995 F.2d 923, 924 (9th Cir. 1993) (when a Bankruptcy Rule 7001 category is at issue, the party seeking relief may obtain the authority he seeks only through an adversary proceeding); *In re Golden Plan of California, Inc.*, 829 F.2d 705, 711-712 (9th Cir. 1987); *In re Commercial Western Finance Corp.*, 761 F.2d 1329, 1336-1338 (9th Cir. 1985); *In re Colortran, Inc.*, 218 B.R. 507, 510-511 (9th Cir. B.A.P. 1997) (bankruptcy court's

1 invalidation of lien on motion proceeding violated due process and the failure to follow the
2 procedural rules rendered the decision of the bankruptcy court void). The requirement of the filing
3 an adversary proceeding and compliance with the Bankruptcy Rules is jurisdictional. *In re*
4 *Commercial Western Finance Corp.*, *supra*, 761 F.2d 1329, 1336-1338 (failure to proceed by
5 adversary proceeding when one is required is reversible error). Courts generally require strict
6 compliance with the rules governing adversary proceedings. *In re Stacy*, 167 B.R. 243, 248-249
7 (N.D.Ala. 1994). Unlike contested matters encompassed by Bankruptcy Rule 9014, the Bankruptcy
8 Rules governing adversary proceedings incorporate most of the Federal Rules of Civil Procedure
9 and an adversary proceeding is a full blown lawsuit. *In the Matter of Haber Oil Co., Inc.*, 12 F.3d
10 426, 437 (5th Cir. 1994). Contested matters require fewer procedural protections and are generally
11 designed for adjudication of simple issues on an expedited basis. For example, in contested matters,
12 Bankruptcy Rule 9014 specifically excludes: (a) the applicable rules concerning pleadings; (b) the
13 requirements of pleading jurisdiction or if the matter is core or noncore; (c) the procedures to
14 challenge a defective pleading; (d) the ability to assert a counterclaim and cross-claim; and (e) the
15 ability to join a Federal Rules of Civil Procedure, Rules 19 or 20 party.

16 A party who desires to bring an action designated as an adversary proceeding under
17 Bankruptcy Rule 7001 must file a complaint and must obtain and serve a summons. Bankruptcy
18 Rules 7003 and 7004. A Bankruptcy Rule 7001 matter initiated by a contested matter fails on
19 procedural grounds. *In the Matter of Perkins*, 902 F.2d 1254, 1258 (7th Cir. 1990); *In re Colortran*,
20 *supra*, 218 B.R. 507, 510-511. Further, including a matter governed by Bankruptcy Rule 7001 in
21 another proceeding already before the court does not satisfy the procedural rules required by
22 Bankruptcy Rule 7001. *In re Commercial Western Finance Corp.*, *supra*, 761 F.2d 1329, 1336-1338;
23 *In re McKay*, 732 F.2d 44, 48 (3d Cir. 1984).

24 In addition to the foregoing, Bankruptcy Rule 7007 makes it clear that only certain pleadings
25 are allowed in an adversary proceeding, one of which is a counterclaim. (See Bankruptcy Rule
26 7013). Counterclaims are not allowed in contested matters. Bankruptcy Rules 9013 and 9014.
27 Bankruptcy Rule 7008 specifically requires that pleadings reflect the jurisdiction of the court and
28 state whether the matter is core or noncore and, if noncore, whether the pleader does or does not

1 consent to the entry of final judgment by the bankruptcy court. These and other adversary rules are
2 designed to assist the court in resolving fundamental questions concerning its jurisdiction and the
3 ability to hear and determine issues. *In the Matter of Haber Oil Co., Inc.*, *supra*, 12 F.3d 426, 440; 10
4 Collier on Bankruptcy, *supra*, General Rules Of Pleading, §7008.02, pp. 7008-2-7008-3.
5 Bankruptcy Rule 7009 requires that matters such as capacity, fraud, mistake, the pleading of
6 conditions precedent and other matters be specifically pleaded. Finally, Bankruptcy Rule 7012
7 addresses the ability of the opposing party to file a variety of motions to challenge the sufficiency
8 of an adversary proceeding. Many of the motions under Bankruptcy Rule 7012 address the ability
9 of a bankruptcy court to hear a matter in the first place or to determine whether the law recognizes
10 the purported claims asserted by the pleader.

11 An objection to a proof of claim is a contested matter. Bankruptcy Rule 9014. As noted
12 above, Bankruptcy Rule 9014 does not authorize the filing of any counterclaim nor the joining of
13 additional parties. In the claim objection context and in light of the rules of procedural due process
14 and the pleading requirements for adversary proceedings, several courts addressing the issue have
15 determined that Bankruptcy Rule 3007 does not abrogate the requirements for commencing an
16 adversary proceeding and complying with the strict procedural requirements encompassed by the
17 Bankruptcy Rules.¹ *In re Lawler*, 106 B.R. 943, 953-957 (N.D.Tex. 1989); *In re America's Shopping*
18 *Channel, Inc.*, 110 B.R. 5, 8 (Bankr.S.D.Cal. 1990) (adversary proceeding required where there is an
19 affirmative claim for money); 9 Collier on Bankruptcy (3d Ed. 1999) Objection to Claims,
20 §3007.01[1] p. 3007-2 (if the objection is joined with a request for affirmative relief in the form of
21 a counterclaim, an adversary proceeding must be commenced). Essentially, the assertion of a
22 counterclaim triggers the operation of all of the rules governing adversary proceedings including
23 the filing and service of a summons and complaint. *In re Lawler*, *supra*, 106 B.R. 943, 956-957. As
24 the court in *Lawler*, noted, Bankruptcy Rule 3007 represents an attempt to preserve rather than
25 eliminate the procedural rules for an adversary proceeding and leaves it to the objecting party to put

26
27 ¹Bankruptcy Rule 3007 provides: An objection to the allowance of a claim shall be in
28 writing and filed. A copy of the objection with notice of the hearing thereon shall be mailed
or otherwise delivered to the claimant, the debtor or debtor in possession and the trustee at
least 30 days prior to the hearing. If an objection to a claim is joined with a demand for
relief of the kind specified in Rule 7001, it becomes an adversary proceeding.

1 an adversary proceeding properly in motion. (*Lawler* at 957).

2 **CONCLUSION**

3 The need for an adversary proceeding is triggered when a bona fide dispute exists; at that
4 point, due process considerations come into play. See *Moldo vs. Clark*, *Infra*. Here, there was not
5 only notice of a claim to items subject to sale but evidence of actual title in the hands of movants
6 and others not related to the estate. At this point all sale efforts should have stopped and an
7 adversary proceeding commenced. The Trustee's attitude toward the movants' claims is indicated
8 by his absolute unwillingness to remove from sale even those items where documents of title reveal
9 no interest in the estate. The Trustee's attitude in this regard demonstrates his unreasonableness in
10 failing to acknowledge claims as to undocumented personal property, e.g., equipment and tools.

11 Two things are clear. First of all, it is clear that the law puts the burden on the Trustee to
12 establish title in the estate before moving to sell property of the estate. Second, in case of an
13 dispute in which a third party claims 100% ownership in the items to be sold the Trustee has no
14 choice but to file an adversary proceeding to adjudicate title prior to taking an steps in relation to
15 the property, especially where he or she seeks to liquidate the property. The Trustee operates at his
16 or her peril to do otherwise. The Trustee in this case chose to proceed by way of motion to,
17 effectively, adjudicate title in an indirect manner which deprived the movants of due process.
18 Accordingly, the order and judgment entered must be vacated as a matter of law.

19
20 Respectfully submitted.

21 Dated: June 28, 2008

HAUSER & MOUZES
A Professional Law Corporation

22
23 /s/ *David F. Anderson*

24
25 By: DAVID F. ANDERSON, Attorney for
26 Brian Federico, William Federico, Douglas
27 Brown and Terri Brown
28